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In the Supreme Court of the United States

OCTOBER TERM, 1984

P.I.A. ASHEVILLE, INC., ET AL., PETITIONERS

v.

STATE OF NORTH CAROLINA, EX REL.,
LACY H. THORNBURG, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the National Health Planning and Resources Development Act of 1974 gives rise to implied antitrust immunity with respect to acquisitions of competing hospitals, where the Act neither requires nor promotes such acquisitions, and application of the antitrust laws would not frustrate any health planning policy articulated in the Act.

2. Whether North Carolina's review and approval of a hospital acquisition affords private parties antitrust immunity under the "state action" doctrine of *Parker* v. *Brown,* 317 U.S. 341 (1943), where the acquisition is not required by state law, there is no state policy favoring monopolies of institutional health care services, and the parties' activities are not actively supervised by the State after it has approved the acquisition.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.[1]

STATEMENT

1. In December 1979, petitioner P.I.A. Asheville, Inc. (PIA) entered into an agreement to purchase Highland Hospital from Duke University. The agreement provided that ownership of the hospital, which is located in Asheville, North Carolina, would be divided equally between PIA and a group of staff physicians (Pet. App. 24a). In January 1980, PIA entered into an agreement to purchase Appalachian

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[1]This brief also reflects the views of the Federal Trade Commission.

Hall Hospital, also located in Asheville (*ibid.*). The acquisitions were contingent on PIA's ability to obtain a certificate of need (CON) from the North Carolina Department of Human Resources, a state health planning and development agency as defined in the National Health Planning and Resources Development Act of 1974 (NHPRDA), 42 U.S.C. 300k *et seq.* See 42 U.S.C. 300m; N.C. Gen. Stat. §§ 131-175 *et seq.* (1981).[2]

2. In February 1980, respondent, the Attorney General of North Carolina, filed suit in the United States District Court for the Western District of North Carolina under federal and state antitrust laws to enjoin the Highland acquisition. The complaint alleged, inter alia, that "[petitioners] are the largest operator of acute psychiatric hospitals in the private sector in the United States" (C.A. App. 7), and that Highland Hospital and Appalachian Hall are the only private psychiatric hospitals in the 26 counties in western North Carolina. The complaint charged that petitioners and others had conspired to eliminate competition and to acquire a monopoly of private psychiatric hospitals in western North Carolina, in violation of Sections 1 and 2 of the Sherman Act,15 U.S.C. 1 and 2, and that the acquisition violated Section 7 of the Clayton Act, 15 U.S.C. 18. See Pet. App. 24a-25a.

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[2]The NHPRDA conditions federal funding on the state's establishment of a CON regulatory program under which a designated state agency must review the need for proposed new institutional health services or capital expenditures over a threshold amount (42 U.S.C. 300m-2(a)(4)(B)). Although the NHPRDA provides that a CON is not required for acquisitions of existing health care facilities unless bed capacity will be increased (42 U.S.C. 300m-6(d)), North Carolina required such approval at the time of the acquisitions at issue (N.C. Gen. Stat. § 131-176(5) and (17)(b) (1981)). Apparently to conform to federal law, the State amended Section 131-176 to delete the CON requirement for acquisitions of existing facilities, effective October 1, 1981 (1981 N.C. Sess. Laws ch. 651 §§ 2(c) and (m), 3).

Following the state agency's grant of petitioners' CON applications,[3] the district court dismissed the action on the grounds that the NHPRDA impliedly repealed the federal antitrust laws with respect to the acquisition in question and that, because the acquisition was subject to the North Carolina CON review process, it qualified as "state action" exempt from the antitrust laws under *Parker* v. *Brown*, 317 U.S. 341 (1943) (Pet. App. 23a-37a).

3. The court of appeals, sitting en banc, reversed and remanded for further proceedings (Pet. App. 1a-22a).[4] Relying on *National Gerimedical Hospital & Gerontology Center* v. *Blue Cross (National Gerimedical)*, 452 U.S. 378 (1981), the court of appeals determined that the regulatory

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[3]The district court had stayed proceedings pending final state action on the applications (Pet. App. 25a-26a). After the Appalachian Hall CON was granted, the North Carolina Department of Human Resources denied the Highland CON (C.A. App. 71-76). It found that the proposed purchase (1) would adversely affect the cost of providing the services under review, (2) would, in view of PIA's acquisition of Appalachian Hall, seriously affect the potential for competition between the two facilities, (3) would restrict access to the services by making them too costly, and (4) would not have an "economical, efficient impact on the costs of operation of the facility" (*id.* at 73-75). PIA obtained reconsideration of the adverse ruling based on "new and significant" information (*id.* at 98, 100), which consisted of a proposed $6-8 reduction in the daily rates submitted in the original CON application (*id.* at 101). On June 26, 1981, the agency reversed its earlier decision and granted the CON (*id.* at 98-104). The hearing examiner reasoned that the new rates, while greater than the existing rates, were "significantly less than the original proposal" (*id.* at 102) and "within the range of current rates at other private psychiatric hospitals in North Carolina" (*id.* at 103). The change in proposed rates was the only reason given for the agency's reversal; it did not refer to its prior finding that the acquisition would have an anticompetitive effect.

[4]A divided panel of the court of appeals had affirmed on the ground that the NHPRDA impliedly repealed the antitrust laws, without reaching the state action issue (Pet. App. 40a-62a). Three judges dissented from the court's en banc decision, citing the reasons expressed in the panel's majority opinion (*id.* at 22a).

scheme authorized by Congress in the NHRPDA was not so pervasive as to constitute an implied repeal of the antitrust laws, and found no evidence in the language or legislative history of the NHPRDA of any affirmative congressional intent to repeal or displace the antitrust laws with respect to the acquisition at issue here (Pet. App. 11a-19a). The court noted that, while the NHPRDA reflects congressional recognition of the shortcomings of competition in improving the delivery of health-care services, the Act establishes as a national health priority the strengthening of competition in the supply of such services (Pet. App. 11a-12a). The court also reasoned that, because the statute does not require state CON review of acquisitions, such as those at issue here, that entail no change in bed capacity, Congress could not have intended state CON procedures to supplant antitrust review of such acquisitions (Pet. App. 12a).[5] There was, in the court's view, no irreconcilable conflict between application of both the NHPRDA and the antitrust laws to this acquisition (Pet. App. 19a-22a). The court reasoned that application of the antitrust laws is consistent with the NHPRDA policy of making better health care more widely available (Pet. App. 13a-14a).

The court of appeals also rejected petitioners' state action defense (Pet. App. 3a-10a). The court applied the two-pronged test enunciated in *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc. (Midcal),* 445 U.S. 97 (1980). It assumed, without deciding, that the state's CON

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[5]Other factors relied on by the court as inconsistent with congressional intent impliedly to repeal the antitrust laws include the lack of a "pervasive" scheme entrusting competitive considerations to state regulatory agencies (Pet. App. 17a-18a), the failure of Congress to require the states to enforce antitrust standards (*id.* at 18a), and the failure of Congress to provide state agencies with adequate means to guard against antitrust abuses or to provide adequate remedies for abuses of power acquired through the regulatory scheme (*id.* at 14a-16a, 18a).

requirement constituted a "clearly articulated and affirmatively expressed state policy to regulate health care providers' expenditures" (Pet. App. 8a). But the court found that the second part of the *Midcal* test — active state supervision — was not satisfied, because North Carolina did not provide for any continuing review after issuing a CON (Pet. App. 8a). The court rejected petitioners' suggestion that the *Midcal* standard be amended to delete the continuing supervision requirement for private conduct merely authorized by the state (Pet. App. 9a-10a). Finally, the court noted that petitioners' conduct was "voluntarily initiated" and "not in any way advocated, much less compelled, by the state," a consideration "militat[ing] against a finding of state action immunity" (*id.* at 10a).

DISCUSSION

The decision of the court of appeals is correct and does not conflict with the decisions of this Court or of any other court of appeals. Further review is therefore not warranted.

1. The court of appeals' holding that the antitrust laws are not impliedly repealed with respect to the acquisition at issue reflects well-established principles. Implied exemptions from the antitrust laws are disfavored, and "can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the [subsequently enacted] regulatory system." *United States* v. *National Association of Securities Dealers (NASD),* 422 U.S. 694, 719-720 (1975); see, *e.g., Goldfarb* v. *Virginia State Bar,* 421 U.S. 773, 787 (1975). Even then, repeal may be inferred only to the minimum extent necessary to make the subsequent regulation work. *E.g., Silver* v. *New York Stock Exchange,* 373 U.S. 341, 357 (1963).

a. In *National Gerimedical,* this Court held that "the NHPRDA is not so incompatible with antitrust concerns as to create a 'pervasive' repeal of the antitrust laws as applied

to every action taken in response to the health-care planning process" (452 U.S. at 393). In reaching this conclusion, the Court acknowledged (*id.* at 392) the legislative history on which petitioners here rely (Pet. 11-12), but determined that Congress "made plain its intent that 'competition and consumer choice' are to be favored wherever they 'can constructively serve . . . to advance the purposes of quality assurance, cost effectiveness, and access.' " 452 U.S. at 392-393, quoting 42 U.S.C. 300k-2(a)(17).[6] Accordingly, the Court held that " 'the proper approach . . . is an analysis which reconciles the operation of both statutory schemes with one another rather than holding one completely ousted.' " 452 U.S. at 392, quoting *Silver* v. *New York Stock Exchange,* 373 U.S. at 357. To establish their claim for immunity, petitioners must show a "direct conflict between the requirements of the NHPRDA and the Sherman Act with respect to the conduct at issue" (452 U.S. at 391). This they plainly cannot do.

b. The record fails to suggest any congressional health planning objective that would be frustrated if the acquisition in this case were subjected to antitrust scrutiny. Cf. *National Gerimedical,* 452 U.S. at 390. Indeed, unlike the defendant in *National Gerimedical,* petitioners do not even claim that their conduct was undertaken to further or in response to any policy of the NHPRDA: the Act nowhere promotes the acquisition of competing hospitals by a single owner. The findings on which the hearing examiner based his decision to grant the CON (see C.A. App. 98-104) did not rest on any conclusion that the acquisition was necessary to create efficiencies or to avoid unnecessary duplication of services (42 U.S.C. 300k-2(a)(2), (5) and (12)), to

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[6]Contrary to petitioners' suggestion (Pet. 12), the Court's conclusion in *National Gerimedical* applies to the provision of inpatient services: the petitioner in that case was a provider of such services (see 452 U.S. at 380).

provide new or greater access to needed services for underserved consumers (42 U.S.C. 300k-2(a)(1)), or to improve the quality of health care in the area (42 U.S.C. 300k-2(a)(6), (12) and (17)). Nor did the examiner find that the existence of Highland Hospital as a necessary health care facility was threatened if the acquisition were not approved, or that its acquisition by PIA would promote cost containment. The examiner found, to the contrary, that there would be increased costs associated with the acquisition (although he concluded that those costs were "not unreasonabl[e]") (C.A. App. 102). See note 3, *supra*. Thus, even if the acquisition were ultimately determined to be illegal under the antitrust laws, no NHPRDA policy would be thwarted.[7]

Petitioners' decision to purchase the Appalachian Hall and Highland Hospitals reflects their independent business judgment. Issuance of the CON in no way compelled petitioners to go through with the acquisition: petitioners remained free to complete the sale or not, "as their sound business judgment dictated" (*United States* v. *RCA*, 358

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[7]Petitioners postulate circumstances in which an acquisition resulting in joint ownership might further NHPRDA concerns (Pet. 20 n.15). That hypothetical case is not presented here, however. Moreover, if an acquisition did produce the efficiencies that petitioners hypothesize, that would be a defense to consider on the merits of the antitrust claim.

We recognize that there may be circumstances in which an implied repeal of the antitrust laws must be found in order to make the Health Planning Act work. See *National Gerimedical*, 452 U.S. at 393 n.18. For instance, a state agency's decision to deny a certificate of need in order to curtail expansion of unnecessary inpatient facilities might restrain competition in the offering of such services. Invocation of the antitrust laws to override that agency decision would frustrate NHPRDA policy. The acquisition of existing facilities in this case, however, involves no such conflict. Indeed, Congress's concern in the NHPRDA over rising costs (see Pet. 14) is more likely to be met by preventing aggregations of market power in the health care sector than by permitting providers to obtain monopolies.

U.S. 334, 351 (1959)). Where conduct is governed "in the first instance by business judgment and not regulatory coercion, courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws." *Otter Tail Power Co.* v. *United States,* 410 U.S. 366, 374 (1973); *National Gerimedical,* 452 U.S. at 390. Regulatory "approval" in such circumstances does not excuse compliance with the antitrust laws as well. *United States* v. *RCA, supra; United States* v. *Pacific Southwest Airlines,* 358 F. Supp. 1224, 1229-1230 (C.D. Cal.), cert. dismissed, 414 U.S. 801 (1973); cf. *Cantor* v. *Detroit Edison Co.,* 428 U.S. 579, 592-594 (1976). Contrary to petitioners' suggestion (Pet. 13-14), this is so even where the regulatory body is required to take competitive considerations, among others, into account before approving the transaction. *RCA,* 358 U.S. at 351; *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 350 (1963); *California* v. *FPC,* 369 U.S. 482 (1962).[8]

c. Nor does the certificate of need program establish a conflict between the NHPRDA and the antitrust laws with respect to petitioners' acquisition. Congress intended that state CON programs would reduce investment in unnecessarily duplicative facilities and equipment, thus reducing health care costs. To this end, Congress conditioned certain federal funds on state programs requiring CONs for the "obligation of capital expenditures * * * and the offering * * * of new institutional health services and the acquisition of major medical equipment" (42 U.S.C. 300m-2(a)(4)(B)). The NHPRDA, however, does not require state CON

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[8] *National Gerimedical* cannot be distinguished by the absence of regulatory approval in that case. Although an agency's power to approve private conduct may be relevant to Congress's intent to repeal the antitrust laws, that factor alone is not dispositive, as the Court's precedents, reaffirmed in *National Gerimedical* (452 U.S. at 388-389), establish.

approval of capital expenditures for hospitals if the transaction does not involve changes in "the service or bed capacity of the facility" being acquired (42 U.S.C. 300m-6).[9] When a capital expenditure (such as the one at issue here) reflects a change in ownership rather than the addition or elimination of medical facilities, there is obviously no basis for concern over the possibility of unnecessary duplication of facilities. Application of the antitrust laws to these acquisitions therefore does not conflict with Congress's expressed purpose of preventing unnecessary duplication.

Nothing in the discretion afforded the states to require CON approval for acquisitions outside the mandatory federal scheme changes that result in this case. North Carolina's statute imposing a CON requirement for the acquisition at issue (a requirement it subsequently repealed, see note 2, *supra*) does not reflect any inconsistency between the federal NHRPDA and the antitrust laws.[10] And there is

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[9]A provision expressly exempting acquisitions that result in no change in services or bed capacity was added to the Act in 1979. Regulations promulgated by the Secretary in 1977 had defined "new institutional health services" and "capital expenditures" to exclude from compulsory CON review capital expenditures for acquisitions of existing health care facilities. See S. Rep. 96-96, 96th Cong, 1st Sess. 44 (1979).

[10]Petitioners' reliance (Pet. 17-18) on *Gordon* v. *New York Stock Exchange, Inc.*, 422 U.S. 659 (1975), and *United States* v. *National Association of Securities Dealers, supra,* is misplaced. In both cases, the regulatory schemes expressly authorized the Securities and Exchange Commission to oversee and regulate the activities at issue. The Court found in the history and language of the legislation a clear congressional awareness of and intent to permit the very anticompetitive acts complained of — fixed commission rates and restraints on the transfer of mutual funds. *Gordon,* 422 U.S. at 681-682; *NASD,* 422 U.S. at 726-727. The Court concluded that an irreconcilable conflict existed between the Commission's regulatory authority to supervise the private conduct in question and the different standards established by the antitrust laws. In *Gordon,* the Court noted (422 U.S. at 689) that application of the antitrust laws would subject the exchanges to

no evidence that Congress or even North Carolina viewed the CON requirement as inconsistent with application of the federal antitrust laws. Indeed, the certificate of need issued to petitioners (U.S. C.A. Br. A1) specifically notes that it "does not supplant provisions or requirements embodied in * * * statutes other than [the North Carolina law]".[11]

2. The court of appeals correctly rejected petitioners' claim of immunity under the state action doctrine. The court appropriately identified the voluntary nature of petitioners' conduct as a factor militating against their claim (Pet. App. 10a), although it failed to recognize that the lack of state compulsion is sufficient to dispose of the defense. Applying the two-part standard set forth in *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc., supra,* the court of appeals did not decide, under the first requirement, whether the challenged restraint was clearly articulated and affirmatively expressed as state policy, because the court determined that the second requirement — active state supervision — was not satisfied (Pet. App. 8a-10a). In our view, the state's involvement satisfies neither prong of the *Midcal* test.

"conflicting standards," so that they "might find themselves unable to proceed without violation of the mandate of the courts or of the SEC." Similarly, in *NASD,* the Court held (422 U.S. at 729-730) that "the antitrust laws must give way if the regulatory scheme established by the Investment Company Act is to work." No such conflict exists between the states' CON authority and the antitrust laws: it is possible to comply at once with both schemes, without frustrating the policies behind either of them.

[11]Petitioners presumably would not seek immunity under the NHPRDA if North Carolina had not adopted rules subjecting their acquisitions to CON review. But such a claim of immunity would follow logically from their argument (Pet. 17-20) that even the "unexercised power" of a regulatory body to prescribe rules is sufficient to justify immunity in all cases.

a. In *Parker* v. *Brown,* 317 U.S. 341, 351 (1943), the Court held that the Sherman Act does not prohibit "state action or official action directed by a state." The Court emphasized, however, that immunity is limited to restraints imposed as an act of government by the states and their agents. The states do not have the power to shield privately imposed restraints of trade: "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." *Id.* at 351; see *Cantor* v. *Detroit Edison Co,* 428 U.S. at 592-593.

Thus, in the only two cases in which the Court directly considered whether private conduct should be immunized because of state involvement, the Court held that the absence of state compulsion was fatal to the defendants' claim. *Goldfarb* v. *Virginia State Bar, supra; Cantor* v. *Detroit Edison Co., supra.* In *Goldfarb,* the Court held (421 U.S. at 791 (emphasis added)) that "anticompetitive activities must be *compelled* by direction of the State acting as sovereign" in order for private defendants to obtain immunity under the state action doctrine. The Court reiterated this standard in *Cantor* (428 U.S. at 592-593 & n.28), and each of the separate opinions endorsed *Goldfarb*'s compulsion requirement. 428 U.S. at 600 & n.41 (plurality opinion); *id.* at 604 (Burger, C.J., concurring); *id.* at 609 (Blackmun, J., concurring); *id.* at 623-626 (Stewart, J., dissenting). These holdings follow directly from the federalism rationale articulated in *Parker* v. *Brown, supra.* Restraints compelled by the state are properly attributed to the state itself. But where, as here (see pages 7-8, *supra*), private conduct is not compelled, the restraint is the product of private decision-making that the state is powerless to immunize under the *Parker* rationale (see 317 U.S. at 351).[12]

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[12]For a more extensive discussion of this point, see the Brief for the United States (at 14-27) in *Southern Motor Carriers Rate Conference*

The court of appeals interpreted this Court's decision in *Hoover* v. *Ronwin,* No. 82-1474 (May 14, 1984), to permit a private party to claim state action immunity even if the state merely authorizes or approves the activity in question (Pet. App. 4a). The court of appeals concluded, therefore, that the two-part *Midcal* standard governed. Neither *Ronwin* nor *Midcal,* however, abandoned the compulsion requirement for private parties. *Midcal* involved a challenge to a state statute that compelled resale price maintenance by private liquor wholesalers. The legality of private conduct was not at issue; the Court held the statute itself invalid because it did not meet the active state supervision prong of the two-part test that the Court derived from its earlier decisions. In discussing its precedents, the Court expressly quoted (445 U.S. at 104, quoting 421 U.S. at 791) the *Goldfarb* requirement that " 'anticompetitive activities must be compelled by direction of the State.' " In *Ronwin,* the Court concluded (slip op. 14) that the challenged conduct "was in reality that of the Arizona Supreme Court" — no private conduct was involved. Accordingly, the court of appeals' accurate conclusion (Pet. App. 10a) that the challenged conduct in this case was "voluntarily initiated by P.I.A., and not in any way advocated, much less compelled, by the state" requires rejection of petitioners' state action defense.

b. In any event, petitioners' claim of immunity fails to satisfy either prong of the *Midcal* test. The challenged restraint in this case is not " 'clearly articulated and affirmatively expressed as state policy' " (*Midcal,* 445 U.S. at 105, quoting *City of Lafayette* v. *Louisiana Power & Light Co.*,

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v. *United States,* No. 82-1922 (argued Nov. 26, 1984) (a copy of our brief in that case is being served on the parties in this case). Because the court of appeals here correctly held that petitioners are not entitled to state action immunity even in the absence of a compulsion requirement (see pages 14-16, *infra*), there is no need to hold this petition pending the Court's decision in *Southern Motor Carriers.*

435 U.S. 389, 410 (1978)). The court of appeals "assume[d] * * * without deciding that there was a clearly articulated and affirmatively expressed state policy to regulate health care providers' expenditures" (Pet. App. 8a (emphasis omitted)). However, the *Midcal* test requires a policy, not merely to regulate the activity in question, but "*to displace competition* with regulation." *Community Communications Co.* v. *City of Boulder,* 455 U.S. 40, 51 (1982) (emphasis added); see *New Motor Vehicle Board* v. *Orrin W. Fox Co.,* 439 U.S. 96, 109 (1978); *City of Lafayette,* 435 U.S. at 413 (plurality opinion). The challenged competitive restraint here — establishment of a monopoly over local health care services — was quite plainly neither articulated nor affirmatively expressed as state policy. Indeed, establishment of monopolies is directly contrary to state policy under the North Carolina Constitution. N.C. Const. Art. I, § 34. Nowhere in North Carolina's certificate of need statute (presently N.C. Gen. Stat. §§ 131E-175 *et seq.* (Supp. 1983)) is there expressed a state policy favoring replacement of competition between existing hospitals with monopoly ownership subject to regulation. The CON issued to petitioners expressly states that it does not "supplant" the requirements of federal or state statutes or regulations (see page 10, *supra*).

In light of the strong disavowal by North Carolina of any intent to displace other applicable laws with state CON regulation (compare *Midcal,* 445 U.S. at 105), subjecting this acquisition to antitrust scrutiny cannot be assumed to frustrate any state policy. Petitioners' freedom to abandon the acquisition even after the CON issued also demonstrates the lack of a state policy helpful to their claim. Cf. *City of Boulder,* 455 U.S. at 55 ("clear articulation" requirement not satisfied where state's position is one of "mere neutrality" with respect to the challenged activity). Thus, the court of appeals could properly have rejected the state action

defense on the ground that there is no clearly articulated and affirmatively expressed state policy to displace competition with respect to the acquisition at issue.

c. The court of appeals correctly held (Pet. App. 8a-10a) that the state's involvement here is not sufficiently substantial to satisfy the second prong of *Midcal* — active state supervision of the anticompetitive policy. North Carolina does not review petitioners' activities once the acquisition has taken place. There is no ongoing rate review nor any other mechanism to check potential abuses of the market power conferred by the acquisition and to ensure conformity with the state's policies, including cost containment. North Carolina's involvement ends with the issuance of the certificate of need.

State supervision of private conduct is necessary to ensure that such conduct furthers state policy rather than remaining "essentially a private [restraint]" (*Midcal,* 445 U.S. at 106). Accordingly, petitioners' suggestion (Pet. 22-23) that the state supervision requirement be abandoned is inconsistent with the fundamental federalism rationale of the state action doctrine, which applies to "state action or official action directed by a state." *Parker,* 317 U.S. at 351-352; see *City of Boulder,* 455 U.S. at 53-54; *Midcal,* 445 U.S. at 103-104. To accept petitioners' invitation to afford immunity where private discretion rather than state regulation replaces competition would nullify the Court's admonition in *Parker* (317 U.S. at 351) that a state may not authorize private parties to violate the Sherman Act or immunize their conduct merely by declaring it lawful.[13]

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[13]Petitioners rely (Pet. 22) on *Town of Hallie* v. *City of Eau Claire,* 700 F.2d 376 (7th Cir. 1983), cert. granted, No. 82-1832 (argued Nov. 26, 1984), which held that the active supervision requirement is unnecessary where a local governmental body is performing municipal services pursuant to state policy. As we discuss more fully in our amicus brief

Petitioners' contention (Pet. 23) that "it makes no sense to * * * requir[e] continuing supervision of a one-time event" fails to take account of the requirement's purpose. A one-time event, such as an acquisition, may violate the antitrust laws if it affords a firm monopoly power or increases concentration in circumstances allowing explicit or implicit coordination by competitiors. Cf. *United States* v. *General Dynamics Corp.*, 415 U.S. 486, 505 (1974). State approval of such an acquisition, unaccompanied by any regulation of the subsequent use of the private market power thereby acquired, would hardly "displace competition with regulation" (*City of Boulder,* 455 U.S. at 55; *New Motor Vehicle Board,* 439 U.S. at 109). Rather, it would displace competition with private power over prices.

As this Court stated in *Midcal* (445 U.S. at 106), "[t]he national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." In *Midcal,* the state statute compelled the posting of and adherence to fair trade contracts. Nonetheless, the Court held (*id.* at 105-106 (footnote omitted)) that the necessary state supervision was lacking, because the state "neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any 'pointed reexamination' of the program." Cf.

(at 20-22) in that case (a copy of which is being served on the parties in this case), the test applied to municipalities that act pursuant to a "clearly articulated and affirmatively expressed state policy" is appropriately different from the test applied to private parties who are not arms of the state and who, in the absence of governmental supervision, cannot be presumed to act to further any public interest. In any event, because petitioners fail to satisfy the other requirements for state action immunity (see pages 11-14, *supra*), this case would not be an appropriate one in which to consider abolishing the supervision requirement for private entities.

Bates v. *State Bar*, 433 U.S. 350, 362 (1977) (rules on lawyer advertising were "subject to pointed re-examination by the policymaker — the Arizona Supreme Court — in enforcement proceedings"). Acceptance of petitioners' argument that no continuing state supervision is required to support state action immunity for the creation of ongoing private market power can be reconciled neither with the reasoning of *Midcal* nor with the purpose of the state action doctrine. It would simply permit states to effectuate pro tanto repeals of the federal antitrust laws at will.[14]

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[14]Petitioners' reliance (Pet. 23-24) on *New Motor Vehicle Board* v. *Orrin W. Fox Co.*, *supra*, is misplaced. That suit challenged provisions of the California Automobile Franchise Act that temporarily delayed — pending a full hearing by the state Board — the opening or relocation of an automobile franchise if an existing dealer filed a protest. The case did not involve purely private anticompetitive conduct, as this case does. The Court found (439 U.S. at 109) "a clearly articulated and affirmatively expressed [state policy], designed to displace unfettered business freedom in the matter of the establishment and relocation of automobile dealerships." No similar state policy can be discerned here (see pages 12-14, *supra*). The Court in *New Motor Vehicle Board* did not specifically address the supervision requirement it articulated two years later in *Midcal*. The Court did note (439 U.S. at 110), however, that the Board could order an immediate hearing and thus "[t]he duration of interim restraint is subject to ongoing regulatory supervision." Moreover, a final regulatory decision to deny permission for the establishment of an automobile dealership conferred no enhanced market power on any private party. Although such a decision could erect temporary barriers to entry, continued denials over time, with each denial requiring a fresh examination of the market, would have been necessary to confer enhanced ongoing market power on firms already in the market. Here, by contrast, the complaint alleges that the state agency has countenanced the establishment of a health care monopoly, without ongoing agency review of the monopolist's activities.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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